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No. 89-1757

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES SCULLY, Superintendent of
Greenhaven Correctional Facility,
and STATE OF NEW YORK,

Petitioners

vs.

FRANK C. PETERSON (80-A-1720),

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION

Petitioners CHARLES SCULLY, the Superintendent of Greenhaven Correctional Facility, and the STATE OF NEW YORK seek a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit (Second Circuit), rendered February 7, 1990 (App. Exhibit E, pp. 61-73) [1] (Second Circuit). The Court of Appeals

[1]. Page references are to Petitioner's Appendix.

vacated a judgment of the United States District Court, Southern District of New York, dismissing FRANK PETERSON's Petition for a Writ of Habeas Corpus. The District Court refused to address the merits of PETERSON's Constitutional claim that excessive judicial intervention by the Presiding Justice deprived him of his right to a Constitutionally fair trial.

The Second Circuit's reversal of the District Court's judgment was predicated upon the ground that any purported failure of PETERSON's trial counsel to comply with contemporaneous objection rules under New York State law presented no bar to habeas corpus review because the intermediate State appellate Court addressed the merits of the claim. Further, the Second Circuit opined that the State Court judgment was not immune to review by the Federal habeas corpus Court because no plain statement appeared in the decision of the Supreme Court of the State of New York, Appellate Division, First Department establishing reliance upon an adequate and independent State procedural ground in accordance with this Court's decision in *Harris v. Reed*, _____ U.S. _____, 109 S.Ct. 1038 (1989).

SCULLY and the STATE OF NEW YORK take issue with the Second Circuit's application of the rule of construction announced in *Harris* to its review of a final state Court judgment rendered prior to that decision.

As this case presents no issue of exceptional importance and is consistent with decisions by this Court and by Circuit and District Courts confronted with the issue of retroactive application of the *Harris*

rule, PETERSON respectfully submits that the Petition for a Writ of Certiorari should be denied.

STATEMENT OF FACTS

FRANK PETERSON was convicted after a jury trial before the Supreme Court of the State of New York of rape, robbery and sodomy arising from two incidents. He was sentenced to a term of incarceration of from twelve and one-half to twenty-five years and remains in the custody of Charles Scully, the Superintendent of the Greenhaven Correctional Facility.

PETERSON's conviction was based upon the testimony of the two complainants. He presented an alibi defense, which was undermined by the trial Judge's extensive questioning. On his appeal to the intermediate State appellate Court, the majority noted in its opinion the inappropriate nature of the Judge's conduct [2] (A. 4) but affirmed the appeal upon its opinion that the error was harmless. The New York State Court of Appeals denied leave to appeal without opinion.

The District Court dismissed the petition for a Writ of Habeas Corpus upon its conclusion that the

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[2]. The Judge that presided over PETERSON's state trial was formerly a prosecutor and the subject of numerous appellate decisions by the Appellate Division of the New York Supreme Court and of the New York State Court of Appeals, condemning his intrusive conduct during criminal trials. See *People v. Mess*, 47 N.Y.2d 996 (1979); *People v. Tartaglia*, 35 N.Y.2d 918 (1974); *People v. Ellis*, 62 A.D.2d 469 (1st Dept. 1978); *People v. Yut Wai Tom*, 53 N.Y.2d 44 (1981); *People v. Charleston*, 56 N.Y.2d 88 (1987).

procedural default rule barred review. The Second Circuit reversed the judgment of the District Court and remanded to provide the District Court with the opportunity to address the merits of the Constitutional claim.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED ON THE GROUNDS THAT IT FAILS TO PRESENT AN ISSUE OF LAW WARRANTING THIS COURT'S REVIEW. THE SECOND CIRCUIT'S APPLICATION OF THE RULE ANNOUNCED IN HARRIS V. REED TO STATE COURT JUDGMENTS ANNOUNCED PRIOR TO THIS COURT'S DECISION IS CONSISTENT WITH PRECEDENTS OF THIS COURT AND OF OTHER FEDERAL COURTS ADDRESSING THE ISSUE.

FRANK PETERSON respectfully submits that the petition for a Writ of Certiorari should be denied. The Second Circuit's application of the rule announced in *Harris v. Reed* is in conformity with settled jurisprudential principles concerning the retroactive application of rules of construction and it is respectfully submitted no issue of law is presented which would warrant this Court's exercise of its discretionary power to review a judgment by Certiorari.

The essence of SCULLY's claim is that the Second Circuit should not have applied the "plain statement" rule announced in *Harris v. Reed* to its review of a final State Court judgment rendered prior to the time that this Court announced its decision in

Harris. It is submitted that such a claim is contrary to reported Federal habeas corpus decisions, including a memorandum opinion of this Court.

In *Griffith v. Kentucky*, 479 U.S. 314, this Court found that new rules of conduct for criminal prosecutions apply retroactively to all cases, state or federal pending on direct appeal, regardless of whether the new rule overrules past precedent.

In *Yates v. Aiken*, 484 U.S. 211 (1988), this Court held that where a decision is rendered after the time that the state Court judgment becomes final, it is appropriate to apply a rule representing an application of a governing principle announced in a prior decision.

It is submitted that the opinion in *Harris v. Reed* does not effect a substantive change in the law but that it merely instructs the Federal Courts on how to apply the procedural default rule established by this Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Indeed, this is the position taken by the United States Court of Appeals in this case (A. 71). In addition, Courts have relied upon Harris v. Reed as guiding the application of the procedural default rule to state Court judgments rendered prior to the Supreme Court's decision. Cf. *Anselmo v. Sumner*, 882 F.2d 431, 432-433 (9th Cir. 1989); *Fierro v. Lynaugh*, 879 F.2d 1276, 1281 (5th Cir. 1989); *Lopez v. Scully*, 716 F. Supp 736, 738-739; *Perez v. Everett Jones*, ____ U.S. _____, 109 S.Ct. 1928 (1989).

In *Perez*, this Court granted certiorari, reversed and remanded a judgment of the United States Court of Appeals for the Second Circuit for

further consideration in light of *Harris v. Reed*. It is submitted that such a ruling by this Court establishes that application of the rule announced in *Harris* to then final state Court judgments is appropriate and supported the reversal of the Second Circuit's order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied, along with such other and further relief granted to PETERSON as this Court may deem just and proper.

Dated: St. James, New York
June 7, 1990

Respectfully Submitted,

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*CJA Appointed Counsel

CERTIFICATE OF SERVICE

Respondent's counsel Jonathan C. Scott hereby certifies that on the 8th day of June, 1990, he served the within MEMORANDUM IN OPPOSITION upon the District Attorney of New York County, Attorney for petitioners, One Hogan Place, New York, N.Y. 10013 by United States Mail.

June 8, 1990

JONATHAN C. SCOTT